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No. 84-468

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CITY OF CLEBURNE, TEXAS, *et al.*,
Petitioners,

v.

CLEBURNE LIVING CENTER, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF QUESTION PRESENTED

Whether intermediate scrutiny under the Equal Protection Clause is appropriate to invalidate the City of Cleburne's actions preventing the establishment of the city's first group home for mentally retarded persons on the invidiously discriminatory ground that its residents would be mentally retarded persons, who suffer from historical prejudice, isolation, and stigmatization, are politically powerless, and possess an essentially immutable characteristic?*

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* Pursuant to Rule 28.1 of the Rules of the Court, it hereby is noted that two of the three corporate respondents—Cleburne Living Center, Inc., which since February, 1982, has been known as Community Living Concepts, Inc., and Advocacy, Inc.—have no parent companies, subsidiaries, or affiliates. The third corporate respondent—Johnson County Association for Retarded Citizens—is a local affiliate of the "Association for Retarded Citizens/United States—National Headquarters."

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Cleburne Living Center, Inc. (hereinafter "CLC"), Jan Hannah, Advocacy, Inc., and Johnson County Association for Retarded Citizens, respectfully request that the Court deny the petition for writ of certiorari filed by the City of Cleburne, Texas, and several of its officials (hereinafter "the City"), seeking review of the Fifth Circuit's judgment in this case. The opinion upon which that judgment is based is reported at 726 F.2d 191, and the denial of the City's motion for rehearing and rehearing en banc is reported at 735 F.2d 832.

CONSTITUTIONAL PROVISION AND ORDINANCE INVOLVED

Cleburne, Tex., Zoning Ordinance, § 8 (June 8, 1965):

> In District R-3, . . . the following uses [are permitted]:
>
> 1. Any use permitted in District R-2.
> 2. Apartment houses, or multiple dwellings.
> 3. Boarding and lodging houses.
> 4. Fraternity or sorority houses and dormitories.
> 5. Apartment hotels.
> 6. Hospitals, sanitariums, nursing homes or homes for convalescents or aged, other than for the insane or feeble-minded or alcoholics or drug addicts.
> 7. Private clubs or fraternal orders, except those whose chief activity is carried on as a business.
> 8. Philanthropic or eleemosynary institutions, other than penal institutions.
> 9. Accessory uses customarily incident . . . to any of the above uses . . .
>
> . . . .

Cleburne, Tex., Zoning Ordinance, § 16 (June 8, 1965):

> Any of the following uses may be in any district by Special Use Permit. . .
>
> . . . .
>
> 9. Hospitals for the insane or feeble minded, or alcoholic or drug addicts, or penal or correctional institutions.
>
> . . . .

U.S. Const. amend. XIV, § 1:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

When CLC and other respondents attempted to establish the first group home for mentally retarded people in the City, the City's officials interpreted its zoning ordi-

nance to require a special use permit for the group home because of the mental retardation of its residents. The special permit requirement was imposed despite the fact that such equally intensive uses as hospitals, public schools, nursing homes, and homes for delinquent children are permitted at the same location without a special use permit.[1] The City, in response to what the Fifth Circuit accurately characterized as the "prejudices and fears of neighbors," 726 F.2d at 201, then denied the special use permit because the residents would be mentally retarded. *See* Trial F.F. #29, at A-8 to 9.

Such intentional discrimination rarely occurs in such pure form; yet, in the City's case, it happened not only through the ordinance's facially discriminatory special use permit requirement, but also through the ordinance's application in the discriminatory denial of the special use permit when it was sought. By these intentional actions, the City deprived thirteen mentally retarded people of the opportunity to live in a group home in the City, even though essentially any other group of thirteen people could have lived freely at the same location without having to seek the City's permission at all.

This is a zoning case about whether a city may exclude mentally retarded persons from a community for no other reason than that they are mentally retarded and some of the neighbors do not want them around. The Fifth Circuit held that a city cannot use its zoning laws to accomplish such an intentionally exclusionary objective. The City

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[1] At p. 4 of its Petition, the City misstates the facts on this point and claims for the first time that the residents' mental reardation was irrelevant to its treatment of the group home as an unpermitted use. The trial court found otherwise. *See* Trial Court Finding of Fact #24, at A-7 of City's Petition [hereinafter cited as "Trial F.F. #—, at A-—"]. ("If the potential residents . . . were not mentally retarded, but the home was the same in all other respects, its use would be permitted under the city's zoning ordinance."); *see also* 726 F.2d at 200. ("The same house with the same number of occupants would be a permitted use so long as the occupants were not mentally retarded.")

now is asking this Court to hear the case and hold that the Fifth Circuit was wrong.

ARGUMENT

I. The Fifth Circuit's Decision Is Not in Conflict With the Decision of Any Federal Circuit Court of Appeals.

The City has cited two circuit court decisions, *California Association of the Physically Handicapped, Inc. v. Federal Communications Commission*, 721 F.2d 667 (9th Cir. 1983), and *Brown v. Sibley*, 650 F.2d 760 (5th Cir. 1981), and claimed that the Fifth Circuit decision is in "direct conflict" with them. *See* City's Petition, at p. 5. The City's statement is wrong. There is no conflict. The Fifth Circuit accurately characterized the issue upon which it chose to rest its decision as "one of first impression." *See* 726 F.2d at 196.[2]

Neither *Brown v. Sibley* nor *California Association of the Physically Handicapped, Inc. v. Federal Communications Commission* even discussed the question of whether classifications based on mental retardation require an intermediate or higher level of scrutiny. *Brown* rejected the argument that the physically handicapped were a suspect class. 605 F.2d at 765-66. *California Association of the Physically Handicapped* rejected the same argument. 721 F.2d at 670. Moreover, the California case is one in which affirmative action was sought, whereas the mere removal of a discriminatory impediment is sought in this case. There is no conflict whatever between the legal

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[2] Judge Politz, who joined Chief Judge Clark and Judge Goldberg on the panel in this case, also sat on the *Brown v. Sibley* panel, yet he noted no conflict. None of the fifteen judges of the Fifth Circuit cited *Brown v. Sibley* even once in discussions of the equal protection issue in this case. Clearly, the City is seeing a conflict not seen by a single member of the court in which the conflict is purported to exist.

principle those two circuit cases established, and the one on which the Fifth Circuit rested its decision in this case.[3]

The range of handicaps is wide, stretching from physical handicaps arising from injuries suffered as an adult, *see e.g., Consolidated Rail Corp. v. Darrone*, —— U.S. ——, 104 S. Ct. 1248 (1984) (involving railway worker whose handicap was due to amputated hand and forearm), to disabilities that arise at birth and are essentially immutable. *Cf. Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 202 (1982) ("wide spectrum of handicapped children, from the marginally hearing-impaired to the profoundly retarded and palsied"). Mental retardation is a unique handicap, and no federal circuit has disagreed with the Fifth Circuit's treatment of it in this case.

The absence of a conflict among the circuits indicates that it is premature for the Court to consider whether heightened scrutiny is appropriate in zoning or other types of cases involving classifications based on mental retardation. This case was a narrow—and comparatively easy—one for the Fifth Circuit. It is not, as the City tries to characterize it, a decision broadly destructive of legislative prerogatives in all areas touching upon mental retardation, as well as all other types of handicaps.

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[3] Dicta in cases decided by the only two other circuits to even mention the issue in passing suggests a harmony among the circuits. *See Abrams v. 11 Cornwell Co.*, 695 F.2d 34, 39 (2d Cir. 1982) (discrimination against mentally retarded persons is invidious); *Romeo v. Youngberg*, 644 F.2d 147, 163 n.35 (3d Cir. 1980 (mentally retarded persons may be a "discrete and insular minority"). Further harmony is suggested by the recent decision of *J. W. v. City of Tacoma*, 720 F.2d 1126 (9th Cir. 1983), which applied heightened scrutiny to invalidate zoning actions excluding a group home for mentally ill people. Of course, as the trial record here reveals and the Fifth Circuit explained, *see* 726 F.2d at 192 n.2 & at 198-99 n.11, mental retardation is not a mental illness. It is essentialy a learning problem, not an emotional disorder.

II. The Decision of the Court of Appeals Does Not Warrant Review by This Court as a Matter of Significant Public Importance.

In its effort to convince the Court of the case's importance, the City has vastly overstated the reach of the Fifth Circuit's decision. The decision is a relatively narrow one and does not call into question virtually all public executive and legislative decisions concerning mentally retarded people.

The facts in this case present a situation of intentional, invidious discrimination against mentally retarded people, with the City simply excluding them from the enjoyment of a basic benefit available to nearly everyone else—the right to live in a community. It is not a case, as the City has tried to characterize it, in which the judicial branch intrudes into delicate legislative or executive adjustments in the allocation of public resources. The Fifth Circuit's decision establishes no principle which directs how such adjustments must be balanced between the needs of mentally retarded people and the needs of others. It requires no increase in or reallocation of public funds. It says nothing about public actions which unintentionally affect mentally retarded people. Such public actions are not called into question by the Fifth Circuit.

The Fifth Circuit's decision will not lead to an inundation of the federal courts by mentally retarded claimants. Rarely will there be such a clear case of intentional, invidious discrimination by public officials against mentally retarded people. It will be even rarer that zoning cases such as this one will arise in the federal courts. Zoning cases, even those involving disputes about group homes for mentally retarded people, nearly always arise in state courts and present state law issues. In the future, this circumstance will occur even more often. Increasingly, as the City itself recognizes, *see* City's Petition, at p. 12, state legislatures are taking the initiative to pass state zoning laws to insure that community-based

living alternatives for mentally retarded people are made available.[4] As these state laws are implemented, fewer and fewer communities will be able under state law to engage in the blatantly exclusionary actions in which the City here engaged. Those that do, if they are called to task, will be called to task in state courts to explain their failure to abide by state law standards, as most such cities now are.

This case, which still must be litigated in the trial court on the issue of damages, simply will not present for this Court's resolution the significant issues attributed to it by the City. It is true that the case is very important to the parties involved in it, but that, of course, is not the test of significance that the Court applies. Whether zoning ordinances such as the City's which provide no guidelines whatsoever regarding issuance of a permit, which include nearly incomprehensible use classifications, and which refer to mentally retarded persons as "feebleminded" are constitutional is a question the federal courts are unlikely to see very often.

III. The Decision of the Court of Appeals Is Correct.

Given the facts of this case and the ordinance at issue, the Fifth Circuit reached the correct result of invalidating the City's ordinance on its face and as applied in the special use permit denial. The question before the Fifth

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[4] These state legislative initiatives, which will make zoning ordinances as antiquated as the City's increasingly rare, are, in part at least, responsive to policies such as those embodied in the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6001-6081, which "establishes a national policy to provide better care and treatment" to developmentally disabled citizens. *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 15 (1981). One aspect of the policy is that developmentally disabled citizens should receive habilitation in a setting least restrictive of their personal liberty. 42 U.S.C. § 6010(2). *See also* § 7, Texas Mentally Retarded Persons Act of 1977, Tex.Rev.Civ.Stat.Ann. art. 5547-300 (Vernon Supp. 1984).

Circuit was not whether mentally retarded people are entitled to a special, particular treatment somehow setting them above or apart from other citizens. The question, instead, was whether they are to be treated as though they are entitled to less than other citizens. The Fifth Circuit held that they were entitled at least to equal treatment under the laws, including the City's zoning ordinance. The court's conclusion was correct.

In seeking to overturn the Fifth Circuit's decision, the City now is asking this Court to place its imprimatur on the City's exclusionary actions which, as the trial court found, were based on the mental retardation of the group home's residents. *See* Trial F.F. #24, at A-7, and F.F. #29, at A-8 to 9. In effect, as the Fifth Circuit stated, the City wants the Court to allow "prejudice [to] become[] its own excuse," 726 F.2d at 202. This Court already has found such a principle constitutionally impermissible, *see In re Griffiths*, 413 U.S. 717, 722 n.8 (1973), and the Fifth Circuit properly rejected the City's argument.

The Fifth Circuit also acted correctly in recognizing that mentally retarded people suffering from invidious, intentional discrimination should receive more constitutional protection than, for example, that received by people such as the displaced hot dog vendors in *City of New Orleans v. Dukes*, 427 U.S. 297 (1976). While recognizing that mentally retarded people have special needs that in some contexts call for non-invidious distinctions to be made, 726 F.2d at 198, the Fifth Circuit appropriately looked to this Court s discussions of suspectness for guidance in arriving at the proper level of judicial scrutiny to apply to the City's actions in this case. *See* 726 F.2d at 196-200.

In evaluating the indicia of suspectness previously elucidated in cases such as *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973) (indicat-

ing that a class is suspect if it is saddled with disabilities, has been subjected to a history of purposeful unequal treatment, or has been relegated to a position of political powerlessness), the Fifth Circuit looked to two especially pertinent facts determined by the trial court. In one, the trial court found that "[g]roup homes currently are the principal community living alternatives for persons who are mentally retarded. . . ." Trial F.F. #30, at A-8. In the other, it found that "[p]ersons who are mentally retarded historically have been subject to exclusion from the political process and have been isolated in remote, stigmatizing living arrangements." Trial F.F. #32, at A-8.

Then, the Fifth Circuit looked to *Plyler v. Doe*, 457 U.S. 202 (1982), and determined that the intermediate tier of scrutiny was appropriate. Its determination was correct. The circumstances of this case, as the Fifth Circuit found, are analogous to those in *Plyler v. Doe*, *supra*, where persons not responsible for their status (there, children of illegal aliens; here, mentally retarded persons) were seeking basic societal benefits (there, education; here, a place to live). In such circumstances, the intermediate tier of scrutiny was properly applied and the statutory scheme was invalidated. The Fifth Circuit's decision was consistent with, and not contrary to, principles already established by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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